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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 32

UNITED STATES OF AMERICA, *ex rel.* LEE KUM HOY, LEE KUM CHERK, and LEE MOON WAH,

Petitioners,

—v.—

EDWARD J. SHAUGHNESSY, District Director of the Immigration and Naturalization Service,

Respondent.

ON A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONERS

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The opinion of the Court of Appeals (R. 413-422) and the dissenting opinion of Circuit Judge Jerome Frank (R. 422-428) are reported in 237 F. 2d 307. The three opinions of the District Court (R.[1] 69a-77a, 55a-63a, 36a-51a) are reported in 133 F. Supp. 850, 123 F. Supp. 674 and 115 F. Supp. 302.

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[1] The record consists of the "Appendix of the Respondent" in the court below containing the administrative proceedings (R. 1a-401a) and the "Transcript of Record" containing the proceedings in the court below and certain exhibits of petitioners (R. 402-430).

Jurisdiction

The judgment of the Court of Appeals was entered on September 25, 1956 (R. 429-430). The petition for certiorari was filed on November 2, 1956 and certiorari was granted on January 14, 1957 (R. 430). The jurisdiction of this Court rests on 28 U. S. C. 1254(1).

Constitutional Provision Involved

The Fifth Amendment of the United States Constitution provides in part:

> "No person shall * * * be deprived of life, liberty or property without due process of law; * * * ."

Question Presented

Whether, as limited by the order granting certiorari (R. 430), there was an unconstitutional discrimination against petitioners in the use of blood tests to determine their United States citizenship upon their applications to enter the United States.

Statement of the Case

On June 17, 1952 the petitioners (Lee Kum Hoy, Lee Kum Cherk and Lee Moon Wah), two boys and a girl, being then 22, 13 and 12 years of age, arrived at Ellis Island, New York, and applied for admission to the United States as citizens thereof by virtue of having derived their citizenship from their father, Lee Ha, a United States citizen. They were refused admission and were detained in custody over two years until released on parole in October 1954.

Beginning in July of 1952 the petitioners and their father and mother were examined by officers of the Immigration

and Naturalization Service, sometimes hereinafter called the Service, at a series of hearings with great particularity as to their home in China, their dwelling, family celebrations, identity of nieghbors and relatives. The Board of Special Inquiry found that the testimony of all the petitioners and their parents "has been reasonably harmonious and reasonably consistent with the records of Immigration and Naturalization Service; * * *" (R. 149a-150a).

On two occasions in July and August, 1952, the petitioners, two of whom were minors, being unable to speak the English language and without being advised of their rights, were taken by an immigration investigator to the Public Health Service and were subjected to blood tests (R. 41a, 217a). Their two parents were also directed by the Immigration Service to submit to blood tests (R. 219a). The results of the first blood tests excluded all three petitioners as the possible children of Lee Ha while the second and conflicting blood tests excluded only two of them (R. 136a, 137a, 156a). A series of three administrative hearings reviewed separately by the District Court then followed.

First Hearing and Review—At the first special inquiry hearing beginning on August 14, 1952 and concluding on September 18, 1952 (R. 142a-153a), the Board of Special Inquiry in reliance upon these conflicting blood tests excluded all three petitioners from admission and this decision was affirmed by the Board of Immigration Appeals on May 11, 1953 (R. 154a-160a). The District Court (Dimock, *J.*) in its first opinion of September 17, 1953 then conditionally sustained a writ of habeas corpus in order to reopen the hearings for the purpose of affording petitioners an opportunity to cross examine the technicians who took the disputed blood tests and to develop facts concerning alleged racial discrimination in the administration of such tests (R. 36a-53a, 115 F. Supp. 302).

Second Hearing and Review—Prior to the reopened hearing petitioners' counsel requested the Immigration Service by letter to furnish an official to testify with regard to the number of Chinese and white persons, if any, who were blood tested, and practices and policies of the Immigration Service in the administration of such tests. This request was denied at the reopened hearing on November 30, 1953 by the Special Inquiry Officer who stated that "I feel it has no bearing on this case as to whether it is the policy or is not the policy of the Immigration Service to test all Chinese applicants for admission to the United States" (R. 188a-189a). This position was affirmed by the Board of Immigration Appeals in its second decision of June 17, 1954 (R. 268a).

At the reopened hearing Dr. George F. Cameron, Chief, Department of Pathology, United States Public Health Service, who supervised the blood testing of the petitioners, testified that he first began conducting blood tests on behalf of the Immigration and Naturalization Service pursuant to a circular from the Federal Security Agency entitled "Blood-Type Testing on Request of the Immigration and Naturalization Service," dated May 8, 1952 (R. 210a, 315a); that this circular directed blood testing of United States citizens of Chinese descent and that it did not specify blood testing for persons of other races or nationalities (R. 211a). Pursuant to the directions in this circular Dr. Cameron testified that he blood tested about 200 Chinese persons and no persons of other races in the period from June 1952 to June 1953 (R. 212a). Beginning June 1953, the Immigration Service discontinued using the Public Health Service for blood tests (R. 213a) and began to refer these cases to private experts, such as Dr. Leon Sussman, who testified at the reopened hearing on November 5, 1953, that he had conducted 300 blood tests for the Immigration and Naturalization Service; that all the per-

sons tested were Chinese; and that he had never blood tested a white person for the Service (R. 178a-179a).

The Special Inquiry Officer on December 9, 1953, and the Board of Immigration Appeals on April 12, 1954, again ordered the exclusion of the petitioners (R. 225a-236a, 237a-273a). The respondent then sought dismissal of the writ (R. 56a) relying in part upon the assertion in his return to the writ dated July 22, 1953 that such blood tests "are uniformly now requested of all applicants for admission who are similarly situated, without documentary evidence of any kind" of their identity and relationship to the citizen parent (R. 15a). This position was reaffirmed in the respondent's brief which stated that blood tests were "required as a matter of policy for all persons attempting to enter the United States without birth certificates and similar documents" (R. 332a). In rebuttal petitioners cited two cases of Chinese persons who, although being in possession of birth certificates, were nevertheless subjected to blood tests (R. 26a-27a).

In his second decision of September 1, 1954 Judge Dimock noted that these two cases lent substance to the claim of racial discrimination (R. 61a); that racial discrimination was abhorrent to our institutions and that the Immigration Service and the Board of Immigration Appeals denied petitioners due process of law by holding that the issue of racial discrimination had no bearing on the petitioners' application for admission. He then ordered that the proceedings before the Immigration Service be reopened for the second time for the purpose of developing further evidence on the issue of racial discrimination (R. 62a-63a).

Third Hearing and Review—At the second reopened hearing, beginning October 28, 1954 and ending December 10, 1954, the Immigration Service produced as a witness the attorney who had prepared the return and briefs in

opposition to the writ. He attempted for the first time to minimize the absence of a birth certificate as reason for a blood test, claiming that it was only one of the many criteria for determining whether or not blood test evidence should be required (R. 328, 285a). He claimed that the principal and most important criterion for determining exemption from blood tests was whether the person seeking admission was born in an area where an American Consul was located who could then conduct an investigation and verify from neighbors, friends and local government officials his claim of relationship and identity (R. 328a, 286a). When such investigation was possible, he said, the problem of identity and relationship would rarely arise and there would be no need for a blood test (R. 286a). According to this witness this situation was seldom present in Chinese cases because Chinese children were "invariably born in remote interior villages where no birth records are made" and where the American Consul was unable to conduct an adequate investigation (R. 286a-287a). This witness further testified that the feasibility of a consular investigation was a long standing factor, antedating the blood test program (R. 331a).

Cross-examination of this witness resulted in the admission that the alleged long standing criterion for the imposition or nonimposition of a blood test—namely, the feasibility of a consular investigation, had never been mentioned in his return to the writ (R. 333a-336a) or in the respondent's brief (R. 332a). He conceded that the previous position of the Government, as outlined in its pleadings and brief, was that blood tests would be required in all cases wherein the applicant seeking admission was unable to present a birth certificate and that there was no mention whatever of the feasibility of a consular investigation as being the determining factor for blood tests (R. 332a-344a).

Petitioners, claiming that all Chinese as a racial class were always required to submit to a blood test regardless of whether they had birth certificates or whether they were born in an area where a consular investigation was possible, introduced into evidence, as examples, five cases, Exhibits 27 to 31, (R. 402a-413a). Four of these exhibits were introduced at the special inquiry hearing (R. 355a-356a, 74a-76a) and one before the Board of Immigration Appeals (R. 112a). In each of these cases the applicant was a Chinese child born in the British Territory of Hong Kong, his parents were married in Hong Kong and the child and his mother were living there. The oldest child blood tested in these cases was six years of age and two of the children were less than a year and a half old at the time of the blood tests. In each case the child had never been to China, there was presented a contemporaneous birth certificate issued by the British Government, a British marriage certificate for the parents, and the child was born and lived in an area wherein the American Consul could and did conduct an extensive investigation. Nevertheless, in all these cases the Immigration Service required blood tests.

The respondent's witness also attempted to show the lack of racial discrimination by claiming four "recent" cases involving blood tests of "non-Chinese" (R. 283a-284a). On cross-examination, however, he was unable to state categorically that in these four cases the "non-Chinese" were not colored persons (R. 352a) and further admitted that at least two of them very likely were Negroes (R. 356a-357a). A specific request by counsel to examine these files in order to ascertain the true facts was denied (R. 351a).

The Government's witness was unable to cite a single instance, from the commencement of the blood tests in June of 1952 up to and including his examination on December

10, 1954, wherein a white person was ever blood tested (R. 356a-358a). He was also unable to cite a single case during this two and one-half year period wherein a Chinese person, regardless of the amount of other proof of his claim, was ever excused from the blood tests (R. 377a). Moreover, this witness admitted that the official Operations Instructions of the Immigration Service did at one time contain a specific reference to blood testing Chinese persons and that it had been recently amended to delete this reference (R. 326a-327a). A request to examine these instructions was denied on the ground that they were "confidential" (R. 323a-324a). After this hearing and on January 18, 1955 the Special Inquiry Officer again excluded the petitioners, holding that there was no racial discrimination in blood testing Chinese (R. 382a-391a). The Board of Immigration Appeals affirmed this decision on May 5, 1955 (R. 392a-401a).

On June 7, 1955 the respondent again moved to dismiss the writ (R. 67a-68a) and Judge Dimock, on the basis of the last hearing and on the entire record covering the two earlier administrative hearings, three appeals to the Board of Immigration Appeals, and three review hearings before the District Court, found that the policy of the Immigration Service was to "apply blood tests to all Chinese and to no whites" (R. 71a) and that such racial discrimination was an unconstitutional denial of due process of law. On August 8, 1955 the writ was sustained and the petitioners admitted to the United States as citizens (R. 69a-77a, 133 F. Supp. 850).

On August 15, 1955 the respondent moved for reargument (R. 78a) claiming for the first time that commencing January 10, 1955, sixty white persons had been blood tested and that forty Chinese had been exempted from blood tests in a period prior to June 16, 1952 and prior to blood testing the petitioners (R. 91a-99a). Petitioners

pointed out that the forty Chinese cases were admittedly cases arising prior to the commencement of the blood test program and that the sixty white cases beginning January, 1955, did not excuse retroactively discrimination against the petitioners in 1952 (R. 113a). Judge Dimock denied the motion for reargument without opinion (R. 115a-116a).

The Court of Appeals, Circuit Judge Frank dissenting, reversed Judge Dimock's decision and held that the finding of discrimination was not warranted; that the Immigration Service was actuated by a police motive rather than racial discrimination; and that there was no proof that the Immigration Service was "race-conscious" in the matter (R. 421a).

Summary of Argument

I. The evidence conclusively supports the District Court's findings that petitioners were subjected to a blood testing procedure applied to all Chinese persons seeking to enter the United States as United States citizens and not applied to any white persons in the same situation. The respondent persisted in maintaining in the administrative proceeding and in the courts below that the blood testing procedure was applied to white persons as well as to Chinese but no case was proved in which any Chinese had been excused from blood testing during the period in question or in which any white person had been blood tested. The court below agreed with the District Court that the evidence established that all Chinese were blood tested and that no white persons were blood tested. On this record an unconstitutional racially discriminatory practice was proved and the blood tests of petitioners should be held to be void and the petitioners admitted to the United States as citizens upon the evidence in the case.

II. The court below, after rejecting respondent's contention that blood testing was extended to white persons,

sustained the constitutionality of blood testing Chinese and no white persons on the legal ground that it was not established that the discriminatory practice was "actuated by racial prejudice" rather than a permissible police motive. The petitioners contend that the issue of factual or legal justification for a blood testing practice concededly applicable only to Chinese was not an issue tried in this case and was not relied upon by the respondent who insisted throughout that blood testing was extended to white persons. On the record the defense of justification is not available to the respondent. Moreover, even if the defense of justification of a blood testing procedure applicable only to Chinese is available on the record there is no support either in the facts or in the law for such a justification. The facts do not establish any rational or excusable basis for blood testing only Chinese. As a matter of law a practice racially discriminatory on its face is not excused because the officials administering the practice are not proved to have been "actuated by racial prejudice."

Argument

The respondent originally contended in the administrative proceedings and in both courts below that the blood test practice was in fact not restricted to Chinese but was extended to other persons during the period in question (R. 15a, 60a-61a, 72a). On the facts proved the District Court rejected this contention. The court below in its opinion also did not accept this contention but conceded that there was "no evidence of blood testing in any non-Chinese case or of Chinese admitted without blood testing" (R. 420a). The court below, however, relied upon the view that the disputed practice, even though applied only to all Chinese and no white persons, was lawful if the Service was not "actuated by racial prejudice" and had not "consciously,

in 1952, adopted a discriminatory policy" and was not "race-conscious" (R. 421a). The Solicitor General's brief in opposition to certiorari also does not advance respondent's original contention that the practice was not restricted to Chinese but like the court below contends, in the nature of a plea of confession and avoidance or justification, that blood testing only persons of Chinese origin during the period in question "was not directed against Chinese *because* of their race or color, but *because* of the particular circumstances in China which created special problems" (Br. 12-13, emphasis supplied). Thus both the court below and the Solicitor General appear to have rejected the respondent's original contention that non-Chinese were also blood tested and appear to rely upon some legal justification for the practice. Compare *Hirabayashi* v. *United States*, 320 U. S. 81, in which the military curfew order involved was expressly directed against "all persons of Japanese ancestry" and was justified on the grounds of military necessity.

The petitioners do not know whether the Government in its brief on the merits in this Court will restrict its argument to an attempted justification of the proved practice of blood testing all Chinese and no other persons in the period in question or will also advance respondent's original contention that the practice was not restricted to Chinese. In this situation petitioners' argument may most conveniently be divided to deal with both contentions separately by arguing (I) that in fact the blood testing procedures applied to all Chinese and no white persons, and (II) the reasons asserted in its defense do not supply a constitutional justification.

I.

The evidence conclusively supports the District Court's findings that petitioners were subjected to a blood testing procedure applicable to all Chinese and no white persons.

It is difficult to conceive a state of facts which would more plainly show a practice restricted to one race or ancestry than the record in this case. Despite the obstacles of the Government's claim of confidential privilege for both its Operations Instructions (R. 323a-324a) and also its case records regulating and disclosing the blood test procedure (R. 351a), the petitioners established as a fact that during the two and a half year period between their arrival in the United States on June 17, 1952 and the last administrative hearing before a Special Inquiry Officer on December 10, 1954, five hundred Chinese persons were blood tested on behalf of the Service to determine paternity of applicants for admission to the United States and no white persons were blood tested. The practice was commenced pursuant to a circular from the Federal Security Agency dated May 8, 1952, entitled "Blood-type Testing on Request of the Immigration and Naturalization Service" and expressly directed blood testing of United States citizens of Chinese descent and did not specify blood testing persons of other races or nationalities (R. 210a-211a, 315a). Dr. Cameron of the United States Public Health Service testified that pursuant to this circular about two hundred Chinese persons and no other persons, were blood tested between June 1952 and June 1953 (R. 212a). In June 1953 the Service discontinued using the Public Health Service for blood tests (R. 213a) and used private experts such as Dr. Leon Sussman who testified at a hearing on November

30, 1953 that he had conducted for the Service three hundred blood tests of Chinese persons but no white persons (R. 178a-179a).

Although the Government would not admit the inescapable conclusion from the medical testimony that only Chinese persons were blood tested, the Government's witness up to and including the last administrative hearing on December 10, 1954, was unable to cite a single instance either where a white person was blood tested (R. 357a-358a) or where a Chinese person was not blood tested regardless of the other proof available to support the claim of paternity (R. 377a-378a). The witness admitted that the confidential Operations Instructions of the Service, until their recent amendment, contained specific reference to blood testing Chinese persons (R. 327a). The suggestion in the witness' direct testimony that there were four recent cases of blood tests of "non-Chinese" (R. 283a-284a) upon cross-examination appeared to be two cases of Negroes (R. 356a-357a) and two other cases in which the names were not Chinese but the witness could not state that these individuals were not colored persons and a request to produce the files to determine the facts was denied on the ground the files were privileged (R. 351a-352a).

The facts stated in the affidavit of Dorris E. Yarbrough of August 22, 1955 (R. 91a-99a) in support of the motion for reargument denied by the District Court, if they may be considered at all at this time, further support the conclusion that only Chinese and no white persons were blood tested during the period in question from June 1952 to December 1954. Exhibit "A" annexed to the affidavit lists sixty cases of non-Chinese persons blood tested beginning on January 10, 1955 (R. 96a-98a). Exhibit "B" annexed to the affidavit lists forty Chinese persons allegedly ad-

claimant whose parents had generally recorded his birth at the local American consulate. And even if this were not the case, field investigation of the place of birth or other corroborating evidence was usually available in the non-Chinese case. On the other hand, field investigation in Chinese cases was not feasible (even under normal political conditions) since the rural villages alleged as the place of birth were unknown to American authorities. As a result, the State Department and the Immigration Service were faced with the formidable task of seeking out discrepancies in a Chinese claimant's story, to ascertain the validity of his claim. Such a method was both unreliable and unsatisfactory because of language differences, confusing complexities in Chinese family relationships, and radical cultural distinctions. The net result was that a scrupulously memorized false story might have a better chance to succeed than a true one containing minor discrepancies.

3. The possibilities of fraud inherent in this situation were known to have been previously exploited. In many instances, the putative parent returning to the United States from China would report to the immigration authorities the maximum number of children that could have been born and conceived during his stay in China—thus creating "immigration slots". These "slots" were then sold through brokers to Chinese anxious to enter the United States. The brokers, capitalizing on those seeking to enter the United States, ran training schools and sold family histories (Halgoons) at enormous profit.

4. The use of blood tests was designed to help

distinguish the valid from the fraudulent claim, and the tests have been extremely useful in detecting fraud. Tests conducted in Hong Kong, soon after the practice was adopted, conclusively established that at least 40% of the claimants were asserting fraudulent claims. The tests served to alleviate the uncertainty and harshness of sole reliance upon the "discrepancy test" by eliminating, or serving to corroborate, through recognized scientific methods, doubtful claims of parentage.

5. Blood tests were utilized by the Immigration Service with respect to Chinese claimants in 1952, soon after adoption of the practice by the State Department, and thereafter its use was expanded to all doubtful derivative cases regardless of racial origin. In 1953, the State Department authorized all its consulates throughout the world to utilize blood-testing irrespective of the racial origin of the claimant. The Immigration Service soon followed this policy and in 1955 blood tests were taken, in appropriate cases, of sixty non-Chinese of divergent racial backgrounds. Moreover, even at the time petitioners were tested (1952), blood tests were not taken exclusively in Chinese cases but were used in at least four cases involving non-Chinese.

II

1. The due process clause of the Fifth Amendment is, at least, equally tolerant of reasonable "class legislation" directed at correcting particular evils within Congressional reach, as is the equal protection clause of the Fourteenth Amendment respecting state classi-

fication. *National Labor Relations Board* v. *Jones & Laughlin*, 301 U.S. 1, 46; *United States* v. *Petrillo*, 332 U.S. 1, 8-9. While it is beyond dispute that grossly discriminatory legislation or discriminatory administrative action, especially if predicated on racial grounds, would violate due process (*Bolling v. Sharpe*, 347 U.S. 497, 499), no such discrimination has been shown here. On the contrary, the evidence points to the conclusion that blood testing was adopted by the State Department to meet the difficult problems of establishing identity posed in the numerous Chinese derivative citizenship cases arising in the Hong Kong area which could not be reliably solved exclusively by oral interviews with the claimant. Soon after, the practice of taking blood tests was utilized in this country in order to meet precisely these same problems and because its effectiveness in detecting fraud had already been tested by the time persons situated similarly to petitioners arrived in the United States.

2. Nor is it reasonable to conclude, as did the District Court, that because blood-testing was employed in four isolated Chinese cases despite the existence of birth certificates, or the possibility of field investigation, that the entire blood-testing program was motivated by calculated prejudice. Aside from the fact that, during the same period petitioners were tested (1952), the majority of Chinese claimants were not so tested, these four isolated cases in which blood-testing might have been unnecessary can readily be explained as an exercise of caution. And even if testing in these cases was the result of overzealous

or mistaken caution by local officials, it hardly follows that it represents prejudice at the policy-making level.

III

There is no valid reason for excluding the blood-test evidence in this case even assuming that, when petitioners were tested, the group tested was more limited than it should have been. The evidence is clearly trustworthy, it conclusively demonstrates that petitioners' claims to derivative citizenship are fraudulent, and no valid reason warrants its exclusion.

1. A valid distinction may be drawn between this case and search-and-seizure or coerced-confession cases. When improper government action leads to reversal of a conviction in the latter situation, the result is based on a finding that a personal right has been violated looking solely to the facts of the particular proceeding; here, no personal rights of the petitioners were violated by blood-testing. An analogous case would be one where the validity of a particular search was not in issue but the defendant asserts its invalidity on the sole ground that in another comparable case, no search had been made, allowing another guilty person to go free. But certainly no basis of exclusion can be spelled out on the hypothesis that some other person who was not blood-tested might also have been excluded if given a blood test. We do not allow one defendant to escape proper punishment because another should also have been prosecuted.

2. Moreover, if the rule of exclusion were regarded as a means of disciplining government officials, ir-

respective of petitioners' personal rights, there would still be no occasion to apply such a rule here. For even if, in its inception, testing was erroneously limited to Chinese, this was, at worst, an error arising from the particular circumstances existing in the Chinese cases. And within two years after adoption of these tests by the Immigration Service any limitation in its use was completely abandoned.

ARGUMENT

The sole issue presented in this case, under the limited grant of certiorari, is whether the blood testing of petitioners, in July and August 1952, to determine the validity of their claims to derivative American citizenship, constituted invalid discrimination. Petitioners do not claim that blood-testing is discriminatorily applied at the present time. They allege, however, that, when they were tested, blood testing was limited to Chinese applicants and not applied to white applicants, and argue from that fact that its use was dictated by racial considerations, and hence was unconstitutional.

The government, on the other hand, submits that there was never any administrative policy to limit blood testing to Chinese applicants; that the initial use of the technique in Chinese cases was motivated not by racial considerations, but by the fact that doubtful issues of paternity and identity were most prevalent in those cases; and that there is, in any event, no reason to exclude the evidence in these cases.

Constitutional issues, particularly claims of discrimination and unfairness, cannot be decided in a

vacuum. The allegation of unconstitutional discrimination must be judged in its setting, both immediate and historical. When so considered, the claim of arbitrary action motivated by racial bias is seen to be without foundation. The use of blood testing techniques when issues of paternity and identity were in doubt was first developed by the State Department in Hong Kong in 1951 because of the special problem with which the Department was there faced. Its usefulness led to its adoption by the Immigration and Naturalization Service and to its general application by both departments. There has been no unconstitutional discrimination.

The Use of Blood-Tests In Passing On Petitioners' Claims of Derivative Citizenship Was Not Discriminatory; the Practice Was First Adopted With Respect to Chinese Claimants Because of the Peculiar Problems Such Cases Presented

A. ***The number of claims to derivative citizenship by Chinese applicants in 1951 represented a special immediate problem for consular officers in Hong Kong.***

1. The State Department first started to require blood tests of claimants to derivative citizenship at Hong Kong in the latter part of 1951. At that time, almost all of the American consulates in China had been closed and thousands of Chinese were congregated at Hong Kong seeking travel documents to press their claims to derivative American citizenship (R. 280).[4] Almost all of the Chinese applications for

[4] Background material, pertinent to the issues posed in this case, is contained in Foreign Service Despatch, Report

American citizenship were based on oral claims and almost all the applicants came from an area in the interior of China (Kwang Tung Province) where, at best, only the most superficial investigation of their claims might have been possible, and even this was precluded by political events requiring the closing of American consulates throughout China. From January 1, 1950 to May 1, 1953, 7,500 travel affidavits were issued by the Hong Kong consulate.[5]

2. Aside from the political climate in 1951, and the other factors we have mentioned, the claims to derivative citizenship by Chinese had a historical background which differentiated them from claims by Europeans. Chinese had come to this country in large numbers after gold was discovered in California in 1848, but had been almost totally excluded from 1882 to 1943. Thus at the time of the greatest immigra-

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on the Problem of Fraud at Hong Kong, issued December 9, 1955, by the American Consul General at Hong Kong (hereinafter referred to as "Report"), ten copies of which are being filed herewith. Additional statistical material and affidavits prepared by the Immigration and Naturalization Service and the Passport Office of the State Department, prepared for this case, appear in the Record at pp. 91-101. These affidavits and statistical material were submitted to the District Court in support of the government's motion for reargument. This motion was denied by Judge Dimock, and the supporting evidence rejected without comment. The materiality of this evidence on the question of discrimination was recognized by the court below although it did not have to reach the question of the propriety of its exclusion since, on the admitted evidence, it found no unconstitutional discrimination (237 F. 2d at 311, fn. 3).

[5] Schatkin, Sussman and Yarbrough, *Chinese Immigration and Blood Tests*, 2 Cr. L. Rev. (Spring 1955) 44,46.

tion from Europe, during the latter part of the 19th and early 20th century,[6] the vast majority of Chinese could not enter the United States, and those few deemed admissible under the Act of 1882, 22 Stat. 58, 60 (*e.g.*, treaty merchants) could not become citizens. A cultural pattern developed whereby Chinese men who were already citizens of the United States would return to China, marry and have children there, and return to the United States, leaving wife and children behind. When the children, particularly the male children, became older, they would apply for admission as children of an American father. Thus claims of derivative citizenship by Chinese had, for a long time, had special significance as a means of entry in the United States. This was not changed by the lifting of quotas since that did not occur until 1943 when quotas generally were severely limited, the annual Chinese quota being fixed at 105 (57 Stat. 600, 601; 58 Stat. 1125).[7]

3. The number of applicants claiming derivative citizenship increased markedly after the adoption of Section 503 of the Nationality Act of 1940, 54 Stat. 1171, which authorized declaratory judgment suits to determine claims of nationality, irrespective of

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[6] Between 1901-1911, nearly nine million immigrants came to the United States. Tyler, *Immigration and the United States* (1956) 29.

[7] The significance of non-quota entry into the United States is demonstrated by the fact that, despite the limited quota of 105 entrants annually, the number of persons of Chinese extraction in the United States increased by 50% between the 1940 and 1950 census. Report, p. 2.

whether the claimant resided in the United States,[8] so that claimants were entitled to a judicial proceeding *de novo* on the issue of citizenship. *Mah Ying Qg* v. *McGrath*, 187 F. 2d 199, 201-202 (C.A. D.C.); *Chow Sing* v. *Brownell*, 217 F. 2d 140 (C.A. 9); *Brownell* v. *Lee Mon Hong*, 217 F. 2d 143 (C.A. 9).[9] Since this was a judicial proceeding, once a prima facie showing had been made, usually by the uncorroborated testimony of the claimant and his alleged parents, proof of non-citizenship had to conform to common law rules of evidence.

It was for the purpose of prosecuting declaratory judgment suits that travel documents were sought by Chinese overseas where passports were denied.

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[8] 8 U.S.C. (1946 ed.) 903 provided in pertinent part:

"If any person who claims a right or privilege as a national of the United States is denied such right or privilege by any Department or agency, or executive official thereof, upon the ground that he is not a national of the United States, such person, regardless of whether he is within the United States or abroad, may institute an action against the head of such Department or agency in the District Court of the United States for the District of Columbia or in the district court of the United States for the district in which such person claims a permanent residence for a judgment declaring him to be a national of the United States. * * *"

Under the Immigration and Nationality Act of 1952, proceedings for declarations of nationality are available only to persons residing in the United States when the suits are commenced (8 U.S.C. 1503(a); 66 Stat. 273).

[9] Before 1940, as to persons who did not reside in the United States, the determination of non-citizenship by administrative authorities was not open to collateral attack. *United States* v. *Ju Toy*, 198 U.S. 253; *United States ex rel. Medeiros* v. *Watkins*, 166 F. 2d 897, 899 (C.A. 2), and cases there cited.

Until some time in 1951, travel documents were issued by the State Department on very slight evidence of identity, the assumption being that only bona fide claimants would ultimately be admitted. Largely because of the difficulties in differentiating valid claims from fraudulent ones in the absence of new investigatory techniques (see *infra*, pp. 24-28), only 2% of the almost 6,000 applicants to whom such documents had been issued were refused entry by immigration authorities.[10] And those refused entry could still bring actions under Section 503.

From August, 1947, when the first Chinese case under 8 U.S.C. 903 was commenced in the federal courts (*Mah Ying Og* v. *McGrath*, 187 F. 2d 199 (C.A. D.C.)), until the end of 1952, 1288 such cases were instituted under that section for a declaration of derivative American citizenship. Of these cases, 716 arose in the Northern District of California, 189 in the Southern District, 61 in the Western District of Washington, and 9 in the District of Oregon. *Ly Shew v. Acheson*, 110 F. Supp. 50, 54-55 (data collected) (N.D. Cal.) vacated and remanded *sub nom. Ly Shew* v. *Dulles*, 219 F. 2d 413 (C.A. 9);[11] *Dong Wing Ott* v. *Shaughnessy*, 116 F. Supp. 745, 751-752 (S.D. N.Y.), affirmed, 220 F. 2d 537 (C.A. 2), certiorari denied, 350 U.S. 847.

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[10] Schatkin, Sussman and Yarbrough, *op cit.*, 2 Cr. Law Rev. at 47.; cf. Report pp. 18-19.

[11] The Ninth Circuit vacated and remanded the case because the district judge applied a too severe burden of proof upon the applicants. The district court again found against the applicants (131 F. Supp. 113). The Ninth Cir-

B. *The usual techniques of checking claims to derivative citizenship were inadequate for this type of claim.*

1. The pattern of behavior which gave rise to these derivative citizenship claims by persons of Chinese descent allowed great opportunities for fraud. It is described in *Mar Gong* v. *McGranery* 109 F. Supp. 821 (S.D. Cal.) (reversed, *sub nom. Mar Gong* v. *Brownell*, 209 F. 2d 448 (C.A. 9)[12]), as follows:

The alleged father of the applicant, either a native born or derivative American citizen, returns, when a young man, to his ancestral village in China to contract a marriage. This marriage, to a native Chinese, is arranged and performed in accordance with established Chinese custom and ceremony. Within a year or so after marriage, a child is born to the couple. The American father generally remains in China until his wife again conceives, and returns to the

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cuit reversed again, finding that the claimants had established their claim to derivative citizenship. *Ly Shew* v. *Dulles*, No. 14,768, June 23, 1956. On November 16, 1956, however, the Court of Appeals vacated its order and opinion and dismissed the appeal pursuant to the request of applicants' attorney who advised the court that he had recently learned that the claims were fraudulent (No. 14,768, filed November 16, 1956.)

[12] The 9th Circuit reversed and remanded on the ground that an improper burden of proof was employed. Moreover, it was held error for the district court to consider the similarity in factual pattern among all Chinese cases on the issue of whether the petitioners in *Mar Gong* were asserting a fraudulent claim. But, as noted by the court below, that "opinion did *not* suggest that knowledge of frauds attempted in cases of a similar pattern might not be considered for its bearing on the scope of investigation appropriate in the particular case. Indeed blood testing was involved in the Mar Gong case" (237 F. 2d 307, 310 n. 1).

United States when his children are quite young or not yet born. Upon his return to the States, he notifies the immigration authorities of all pertinent data relating to the births of his children in China (names, dates of birth, etc.). Subsequently, he may return to China on numerous occasions, and each time the above pattern is repeated. The children grow up in China and when in their teens or older apply for entry to the United States as the sons of a Chinese-American father and Chinese mother. The father has either never seen the children or has seen them only when they were quite young. The claimants submit no birth records. They usually come from rural villages in the interior of China which have no hospitals, or birth registration requirements. In fact, 95 per cent of the 716 applicants in the Northern District of California allegedly come from Kwang Tung Province, from villages unknown to American authorities and not designated on any available maps (*Lay Shew v. Acheson, supra*, 110 F. Supp. at 56). Very rarely is there any corroborating documentary evidence of filial relationship (Report, pp. 51-52). Letters between the alleged parent and the child generally refer to the years immediately preceding the application. The claims are almost always based entirely on self-serving oral assertions.[13] See Schatkin, Sussman and Yarbrough, *Chinese Immigration and Blood Tests*, 2 Cr. L. Rev. (Spring 1955) 44.

[13] Petitioners' putative father came to the United States as a derivative citizen in 1926, returned to China in 1929, and again in 1938. The petitioners were allegedly begotten during his visits in China (R. 39). Their claim to citizenship was unsupported by documentary evidence.